

October 6, 2021

The Honorable Gary Gensler  
Chair  
Securities and Exchange Commission  
100 F Street, NE  
Washington, D.C. 20549

The Honorable Allison Herren Lee  
Commissioner  
Securities and Exchange Commission  
100 F Street, NE  
Washington, D.C. 20549

Dear Chair Gensler and Commissioner Lee:

I write to comment on the U.S. Securities and Exchange Commission (the Commission)'s expected rulemakings and guidance with respect to the disclosure of information related to so-called environmental, social, and governance (ESG) metrics by issuers with significant business activities in the People's Republic of China (PRC), China-based issuers, and investment funds with significant investments in the PRC.

Expanding disclosures related to ESG would apparently be among the Commission's most significant actions in recent history. As one of you said earlier this year, "no single issue has been more pressing for [the then-Acting Chair] than ensuring that the SEC is fully engaged in confronting the risks and opportunities that climate and ESG pose," and "[t]here is really no historical precedent for the magnitude of the shift in investor focus that we've witnessed over the last decade toward the analysis and use of climate and other ESG risks."<sup>1</sup>

Given the apparent significance of these policies and magnitude of business activity in the PRC by potentially affected issuers, the consistent application to the PRC of any disclosure requirements related to ESG that may be proposed by rulemaking or guidance would be critical to the Commission achieving its policy goals and ensuring the internal consistency of those requirements. For example, a standard purporting to provide information about issuers' relevant "social" businesses practices that required the disclosure of "diversity, equity, and inclusion" practices with respect to their workforces in the United States, but not the complicity of those same issuers in supporting the Chinese Communist Party (CCP)'s many human rights abuses within the PRC or globally would be, at the very least, highly inconsistent and arbitrary.

However, previous positions taken by the Commission indicate that the consistent application of its policies to the PRC is not guaranteed. In recent years, the Commission has created arbitrary exceptions to its general rules for activities in the PRC. For example, the Commission has, for a decade, permitted the listing of China-based issuers and some issuers with significant business activities in the PRC on U.S. stock exchanges without the enforcement of applicable U.S. law pertaining to the ability of the Public Company Accounting Oversight Board

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<sup>1</sup> Acting Chair Allison Herren Lee, A Climate for Change: Meeting Investor Demand for Climate and ESG Information at the SEC, Speech at the Center for American Progress, (March 15, 2021).

(PCAOB) to inspect the audits of those issuers.<sup>2</sup> Though the Commission has begun taking important steps to address this disparity, the fact remains that the Commission’s policy in this area operates from a baseline exception for the PRC.

Additionally, in August 2021, the Commission approved a proposed rule change by the stock exchange, Nasdaq, related to board diversity that provided arbitrary flexibility for foreign issuers. Under the rule, foreign issuers, including China-based issuers, are exempt from board diversity disclosures if they are based in a jurisdiction that prevents such disclosures. This gives PRC the ability to exempt China-based issuers from the rule, just as the PRC does for audits by the PCAOB. Even if the PRC does not exempt China-based issuers from the rule, the rule provides the further flexibility that foreign issuers, including China-based issuers, can meet board diversity requirements by adding an additional female director or other individual instead of an underrepresented minority, while U.S. issuers must add both.<sup>3</sup> The Commission approved these exceptions for foreign and China-based issuers despite the fact that the exchange’s stated basis for its rule—to correct the “historical marginalization” of underrepresented minorities—applies strongly to China under the control of the CCP.<sup>4</sup>

In light of this past inconsistency and ongoing issues in the PRC, I write to comment on a number of areas potentially subject to the expected ESG rulemaking or guidance. In these areas, the consistent application of disclosure requirements to entities connected to the PRC would be necessary for the rulemaking or guidance to achieve the Commission’s stated policy goals, or otherwise ensure their internal consistency. Each area raises a number of important considerations.

**A. Human rights.** Disclosures that purport to convey the adherence of an issuer to certain “social” standards should include whether the issuer has violated, or participated, wittingly or unwittingly, in the support of violations of human rights, and the extent to which the issuer had knowledge of such violations or participation. A “social” metric that fails to account for the involvement of issuers in these violations would be obviously arbitrary. But it would also be something worse than arbitrary. Failing to account for specific human rights violations

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<sup>2</sup> President’s Working Group on Financial Markets, Report on Protecting United States Investors from Significant Risks from Chinese Companies, (July 24, 2021) (finding that with respect to China-based issuers, “[t]he PCAOB has been unable to fulfill its statutory mandates under Sarbanes-Oxley to conduct inspections and investigations of audits of public companies for over a decade.”).

<sup>3</sup> 85 Fed. Reg. 80,501 (Dec. 4, 2020).

<sup>4</sup> See C. Boyden Gray & Jonathan Berry, Boyden Gray & Associates, Comments submitted on behalf of the Alliance for Fair Board Recruitment Concerning the Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change to Adopt Listing Rules Related to Board Diversity, Amendment No. 1, 48–49 (Apr. 6, 2021) (“The political and economic marginalization of underrepresented minorities in many (indeed most) foreign countries around the world is significantly worse, not better, than in the United States. It is unlikely that Nasdaq’s Chinese issuers, for example, have many non-Han Chinese minority directors on their boards. Indeed, the Chinese Communist Party to this day has a genocidal policy of Han racial supremacy, not just a legacy of ‘historical marginalization.’ Under Nasdaq’s minority ‘marginalization’ theory, the Chinese government’s overt and pervasive policy of Han supremacy if anything demands more stringent treatment than applies to U.S. firms, not more ‘flexibility.’”); Press Release, American Securities Association, SEC Rule Favors Communist Chinese Companies Over American Businesses (Aug. 9, 2021) (“The CCP is one of the worst human rights abusers in the world, yet the Nasdaq rule goes out of its way to give CCP-controlled Chinese companies preferential treatment over American businesses. It is unconscionable that a rule meant to promote racial, ethnic, and gender diversity on boards kowtows to CCP-controlled companies in this way.”).

recognized by U.S. law would risk, in the eyes of investors concerned with “social” standards, absolving issuers of violations of fundamental human rights so long as they comply with other standards that are considered “social” by the Commission. This failure would be most evident with respect to the application of such standards to the PRC. The PRC under the control of the CCP is committing egregious human rights violations, including crimes against humanity and genocide. Therefore, I ask that the Commission consider and address the following in any applicable ESG rulemaking or guidance:

- 1.** Whether the involvement of an issuer, directly or indirectly, in human rights violations recognized under U.S. law should be specifically disclosed,<sup>5</sup> including:
  - a.** The mass surveillance, internment, forced labor, torture, sexual violence, sterilization, political indoctrination, and other severe human rights violations of over one million Uyghurs, ethnic Kazakhs, Kyrgyz, and members of other Muslim groups in the Xinjiang Uyghur Autonomous Region;<sup>6</sup> and
  - b.** Activities related to denying the people of Hong Kong their long-cherished freedoms and autonomy, including:
    - i.** Censorship or other activities with respect to Hong Kong that prohibit, limit, or penalize the exercise of freedom of expression or assembly by citizens of Hong Kong, or that limit access to free and independent print, online or broadcast media;<sup>7</sup> and
    - ii.** The extrajudicial rendition, arbitrary detention, or torture of any person in Hong Kong or other gross violations of internationally recognized human rights or serious human rights abuse in Hong Kong.<sup>8</sup>
- 2.** Whether the egregious and systematic nature of the human rights violations in the PRC recognized under U.S. law makes necessary that issuers with sufficient connection to the PRC that do not disclose any information related to involvement in those violations should be required to state affirmatively that they are not, or have not been involved in such violations.
- 3.** Whether the significance of the human rights violations in the PRC recognized under U.S. law, in combination with other credible allegations of human rights violations committed in or by entities in its jurisdiction—including unlawfully threatening and intimidating critics, blocking social media content, pressuring publishers to censor their content in the PRC, influencing academic institutions to the detriment of academic freedom, interfering in multilateral institutions, and pressuring U.S. and international companies to suppress practices that do not conform to the political narratives and demands of the CCP<sup>9</sup>—makes necessary that, as a category, issuers doing any business in or with entities in the PRC should be required to disclose any involvement, direct or indirect, or lack of involvement in such violations.

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<sup>5</sup> Cf. Uyghur Forced Labor Prevention Act, S.3471, 116<sup>th</sup> Cong. § 10 (2020).

<sup>6</sup> See Uyghur Human Rights Policy Act of 2020, Pub. L. No. 116-45, 134 Stat. 648 § 2; see also Uyghur Forced Labor Prevention Act, S.65, 117<sup>th</sup> Cong. § 2 (2021).

<sup>7</sup> 86 Fed. Reg. 3800.

<sup>8</sup> *Id.*

<sup>9</sup> Congressional-Executive Commission on China, 2020 Annual Report at 1, 116<sup>th</sup> Cong. (Dec. 2020).

4. Whether disclosures of information related to the performance of an issuer with respect to human rights that, in an effort to quantify or otherwise standardize the performance of an issuer, generally include in a composite metric both human rights that are not internationally recognized human rights and human rights that are so recognized risk minimizing or obfuscating the conduct of an issuer with respect to the violation of internationally recognized human rights.
5. Whether disclosures of information that involve the permission or promotion of free expression in the workplace or elsewhere by an issuer should include whether the issuer has entered to an agreement, in form or substance, with any entity in the PRC that requires the suppression or censorship of speech or of free expression.
6. Whether disclosures of information related to the performance of an issuer with respect to human rights should include whether it or any affiliate has any contract for the sale or lease of goods or services, or any other beneficial economic arrangement with any Communist Chinese military company designated pursuant to section 1237 of the Strom Thurmond National Defense Authorization Act of Fiscal Year 1999, Executive Order 13959 of November 17, 2020, Executive Order 14032 of June 3, 2021, or any future such designation pursuant to similar authority, or with any party in the PRC designated in the U.S. Department of Commerce's Bureau of Industry and Security Entity List.

**B. Supply chain resiliency and sustainability.** Disclosures that purport to convey information about the resiliency or sustainability of an issuer's supply chains should account for the vulnerability of those supply chains to unforeseen manipulation by other actors, especially by governments or agents of governments with jurisdiction over relevant supply chain assets. The loss or diminishment of supply chain assets because of this kind of manipulation would be at least as adverse to an issuer as loss related to other unsustainable practices. Given the CCP's control over strategic sectors in China and elsewhere, supply chains located in China or which rely on PRC-based partners pose risks to resiliency and sustainability. The hoarding of medical supplies by the PRC during the COVID-19 pandemic is one prominent example of these risks.<sup>10</sup> Therefore, I ask that the Commission consider and address the following in any applicable ESG rulemaking or guidance:

1. Whether, with respect to disclosures of information generally, or specific to risks to supply chain resiliency or sustainability, the location of the supply chain of an issuer in the PRC should require a heightened standard for the disclosure of relevant information, including whether the location of an issuer's supply chain in the PRC should be considered a material risk *per se*.

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<sup>10</sup> See, e.g., Marco Rubio, We Need a More Resilient American Economy, THE NEW YORK TIMES (Apr. 20, 2020) <https://www.nytimes.com/2020/04/20/opinion/marco-rubio-coronavirus-economy.html> ("Having monopolized [medical] critical supply chains, the Chinese Communist Party pointed them inward. It ensured that face masks being manufactured in China, for example, went to domestic consumption and their own fight against the virus. Largely unable to import supplies from China, America has been left scrambling because we by and large lack the ability to make things, as well as the state capacity needed for reorienting production to do so. As a result, doctors are forced to ration supplies and, in some cases, cease using necessary protective equipment.").

2. Whether the disclosure of information related to risks to supply chain resiliency or sustainability should include risks caused by the influence over an issuer related to an issuer's ownership or operation of supply chain assets, including whether any joint venture partner, minority investor, or other possible source of influence with respect to an issuer's supply chain is connected to the PRC or operates under any actual or potential control of the Chinese government or CCP.
3. Whether the disclosure of information related to risks to supply chain resiliency or sustainability should include the disclosure of oversight and quality control measures taken by an issuer to ensure visibility into the second- and third-tier suppliers of the issuer in the PRC.
4. Whether the disclosure of information related to risks to supply chain resiliency or sustainability should include whether an issuer benefits, directly or indirectly, from any program related to the PRC's Belt and Road Initiative, or any other subsidy provided by any state or non-state actor related to or controlled by the Chinese government or CCP.
5. Whether the disclosure of information related to risks to supply chain resiliency or sustainability should include whether an issuer has any contract or other beneficial arrangement for the sharing of private data with the Chinese government or CCP.
6. Whether disclosures of information related to supply chain resiliency or sustainability should require an issuer to provide a rational basis for moving supply chain assets to or keeping supply chains assets in the PRC relative to locations in other jurisdictions.

**C. Governance.** Disclosures that purport to convey information about the governance of an issuer should include certain basic governance characteristics that, for U.S.-based issuers, may be considered too widely in use to merit specific disclosure, but in China may have limited use or not otherwise apply to China-based issuers. To the extent that the disclosure of governance information aims to provide information about the accountability of an issuer's decision-making to shareholders, such as with respect to the election of directors or adoption of shareholder proposals, it rests upon fundamental norms of corporate governance that may not apply in the PRC. With respect to China-based issuers, disclosure of an issuer's compliance with more basic norms of corporate governance may be necessary to establishing the efficacy of disclosures for the other governance characteristics proposed by proponents of ESG. Moreover, issuers with significant business activity in the PRC may have their own corporate governance arrangements affected by that activity, such as if a PRC-based subsidiary or partner is represented by a seat on the board of directors of the issuer. Therefore, I ask that the Commission consider and address the following in any applicable ESG rulemaking or guidance:

1. Whether disclosures of information related to governance should require issuers that are exempt from requirements related to the independence of audit and compensation committees to provide information about the independence of its directors, both with

respect to the composition of the board of directors generally and the members of those committees specifically.

2. Whether disclosures of information related to governance that include any characteristics of the composition of the board of directors of an issuer should include the affiliations of directors with entities which pose regulatory risk to the issuer related to the national security of the United States, including any affiliation with the Chinese government or CCP, any Communist Chinese military company designated as such pursuant to section 1237 of the Strom Thurmond National Defense Authorization Act of Fiscal Year 1999, Executive Order 13959 of November 17, 2020, Executive Order 14032 of June 3, 2021, or any future such designation, or with any party designated in the Entity List published by the U.S. Department of Commerce's Bureau of Industry and Security.
3. Whether disclosures of information related to governance should require an issuer to disclose whether its board of directors or other officers, by virtue of its articles of incorporation or domicile in a jurisdiction, are not subject to fiduciary duties to the issuer or its shareholders, and whether the board of directors or other officers have fiduciary duties to any other entity that would interfere with such duties.
4. Whether disclosures of information related to governance with respect to the auditor of an issuer should require an issuer to disclose whether its auditor is subject to the full review of the PCAOB pursuant to the Sarbanes-Oxley Act of 2002.

**D. “Diversity, equity, and inclusion.”** Disclosures that purport to convey information about the contribution of an entity to, or compliance of an entity with standards related to the agenda often referred to as “diversity, equity, and inclusion” raise novel issues with respect to their application to the PRC. Therefore, I ask that the Commission consider and address the following in any applicable ESG rulemaking or guidance:

1. Whether disclosures of information or other rules related to the diversity of the boards of directors or diversity of the workforces of China-based issuers or issuers with significant business in the PRC should require the representation or information about the representation of underrepresented ethnic or religious groups historically oppressed by the CCP, including Uyghurs, ethnic Kazakhs, Kyrgyz, and members of other Muslim groups, Tibetans, Christians, and practitioners of Falun Gong, among others.<sup>11</sup>
2. Whether an issuer should disclose whether it has made any changes to its products for their marketing or sale, or marketing generally in the PRC with respect to race or sex, including whether underrepresented minorities have been removed or diminished in marketing materials in the PRC relative to that used in other countries.<sup>12</sup>

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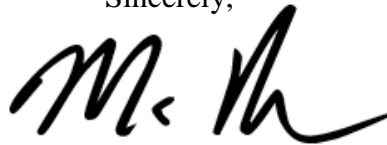
<sup>11</sup> See Congressional-Executive Commission on China, *supra* note 9 at 107–131.

<sup>12</sup> See, e.g., Maane Khatchatourian, ‘Star Wars’ China Poster Sparks Controversy After Shrinking John Boyega’s Character, VARIETY (Dec. 4, 2015), <https://variety.com/2015/film/news/star-wars-china-poster-controversy-john-boyega-1201653494/>; Edward Wong, ‘Doctor Strange’ Writer Explains Casting of Tilda Swinton as Tibetan, THE

As these subject areas demonstrate, requiring the disclosure of social policies by issuers, as the expected ESG rulemakings or guidance may propose, raises important considerations for how those policies apply consistently with respect to the PRC. Moreover, the implications of ESG disclosures for issuers and business activity in the PRC helpfully isolate the principles that the disclosures purport to advance outside of their immediate domestic political context. If the level of “investor demand” for an ESG disclosure for business activity in the U.S. is diminished for substantially similar, or even more substantial activities in the PRC, it may indicate that the disclosure is not primarily about providing beneficial and consistent information to investors about that activity, but instead is an arbitrary attempt to influence issuers on certain domestic political affairs.

Thank you for your attention to this important matter and consideration of these issues.

Sincerely,

A handwritten signature in black ink, appearing to read 'M. Rubio', with a stylized flourish at the end.

Marco Rubio  
U.S. Senator

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NEW YORK TIMES (Apr. 26, 2016) <https://www.nytimes.com/2016/04/27/world/asia/china-doctor-strange-tibet.html>;  
Emily Jashinsky, Why Hollywood’s Cozy Relationship With China Could Face An Ugly Reckoning In The 2020s,  
THE FEDERALIST (Jan. 15, 2020) <https://thefederalist.com/2020/01/15/why-hollywoods-cozy-relationship-with-china-could-face-an-ugly-reckoning-in-the-2020s/>.